Supreme Court, U.S.
FILED
DEC 23 1997
CLERK

(2)

NO. 97-627

In The

Supreme Court of the United States

October Term, 1997

*

HAROLD CLARKE, et al.,

Petitioners,

vs.

GEORGE WEAVER,

Respondent.

*

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*

Submitted by:

Bernard J. Monbouquette
3610 Dodge Street Suite 220
Omaha, Nebraska 68131
(402) 346-1490

12 pp

QUESTIONS PRESENTED.

1. Objection is made to consideration of the first Question Presented in the Petitioners' Petition for Writ of Certiorari. Petitioners assert that they were the prevailing party, which is not totally accurate. The District Court and Eighth Circuit found that the respondent inmate was the prevailing party in that he obtained relief from environmental tobacco smoke (ETS) as a result of his litigation (catalyst theory). The question actually presented by Petitioners' Petition for Certiorari is whether 42USC § 1988 authorizes an award of attorney fees.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
A. ATTORNEY'S FEES CAN BE AWARDED TO THE PREVAILING PARTY AGAINST THE STATE OF NEBRASKA PURSUANT TO 42 U.S.C. § 1988	3
B. THE EIGHTH CIRCUIT'S OPINION IN THIS CASE IS NOT IN CONFLICT WITH LANDGRAF v. USI FILM PRODUCTS AND BRADLEY v. RICHMOND SCHOOL BOARD	3
(1) Whether the requirements of the PLRA impair previously held rights	4
(2) There is increased liability for past conduct	5
(3) There are no new duties imposed with respect to transactions already completed	5
CONCLUSION	8

TABLE OF AUTHORITIES

Page

Cases

Bradley v. Richmond School Board, 416 U.S. 696 (1974). . .3, 6, 7

Cooper and Davis v. Casey, 97 F.3d 914 (7th Cir., 1996). 5

Hendrickson v. Branstad, 934 F.2d 158 (8th Cir., 1991) 4

Hutto v. Finney, 437 U.S. 678 (1978) 3

Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996). 3, 6

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 3, 4, 6

Missouri v. Jenkins, 491 U.S. 274 (1989) 3

Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir, 1970) 4

Weaver v. Clarke, 933 F. Supp. 831 6

CONSTITUTIONAL PROVISIONS

Eleventh Amendment 3

STATUTES AND RULES

42 U.S.C. § 1983 i

42 U.S.C. § 1988. . . . . .i, 2, 3, 4

Prison Litigation Reform Act 2, 5, 7

STATEMENT OF THE CASE

George Weaver filed this action, pro se, in the federal district court pursuant to 42 U.S.C. § 1983 in 1993 seeking damages for his continued exposure to secondary tobacco smoke. Attorney Bernard J. Monbouquette was appointed to represent Mr. Weaver due to Weaver's indigence. Mr. Weaver's lawsuit was amended to add a claim for injunctive relief to the damage claim. The injunctive claim sought a smoke-free environment for Mr. Weaver during his incarceration. The defendants, all officials and employees of the Nebraska Department of Corrections, opposed vigorously the claim for injunctive relief, arguing essentially that the jail officials were unable to provide Mr. Weaver with a smoke-free environment, regardless of their own opinions and desires. (Appendix E, App.34,41.)

The jail officials filed a Motion for Summary Judgment based on qualified immunity, which was granted by the District Court Judge Richard G. Kopf, on November 6, 1995. (Appendix F.) Mr. Weaver filed a Motion for Temporary Injunction, which was argued before United States Magistrate Judge David Piester on January 18 and 19, 1996. On January 28, 1996, Magistrate Judge Piester concluded that Mr. Weaver had presented evidence sufficient to support a finding that the risk to Mr. Weaver of the present levels of environmental tobacco smoke (ETS), over time, constituted a substantial risk of serious harm to his health. (Appendix E,

App.36-40) Once the Court concluded that such risk was substantial, Judge Piester ruled that jail officials were required to take reasonable precautions to avoid the risk. He remarked that for them to make any lesser response would amount to obduracy. (Appendix E, App. 40).

On February 12, 1996, fourteen days after Judge Piester's ruling, Petitioner Harold Clarke, imposed a smoking ban for inmates, which took effect on March 18, 1996. When he announced the ban, he said that "pending inmate litigation, both locally and nationally on the issue of second hand smoke are concerns that must be addressed."

The jail officials then filed a Motion for Summary Judgment on the issue of injunctive relief on March 5, 1996. On June 18, 1996, Judge Kopf granted Weaver an award of attorney fees, which was unsuccessfully appealed to the U. S. Court of Appeals for the Eighth Circuit by the jail officials. They have continued their challenge to that ruling by petitioning the United States Supreme Court for certiorari on the issue of the PLRA.

On April 26, 1996, the Prison Litigation Reform Act was signed into law. (Appendix H, App. 68-69). The pertinent portions of the PLRA do not prescribe the award of an attorney fee to Weaver even if they were to be applied retroactively. Since it is not retroactive in application, the PLRA has no effect on the award of an attorney fee to Weaver under 42 USC § 1988. This Petition for Certiorari should be denied.

ARGUMENT

A. ATTORNEY FEES CAN BE AWARDED TO THE PREVAILING PARTY AGAINST THE STATE OF NEBRASKA PURSUANT TO 42 USC § 1988.

The Petitioners' argument that section 1988 contains no unmistakably clear language abrogating sovereign immunity was made and rejected in Missouri v. Jenkins, 491 U.S. 274(1989). This court has held in Jenkins that application of section 1988 to the States did not depend on congressional application of the States' immunity. Attorney fees are part of costs, and costs are traditionally awarded without regard for the States' Eleventh Amendment Immunity. Hutto v. Finney 437 U.S. 678 at 695 (1978).

This argument by Petitioners was raised at the District Court level and at the Eighth Circuit, where it was rejected both times, citing Jensen v. Clarke, Hutto, and Jenkins. It should be rejected as well by this Court.

B. THE EIGHTH CIRCUIT'S OPINION IN THIS CASE IS NOT IN CONFLICT WITH LANDGRAF v. USI FILM PRODUCTS AND BRADLEY v. RICHMOND SCHOOL BOARD.

The Eighth Circuit Court's decision in this case is not in conflict with this Court's holdings in Landgraf and Bradley. The Petitioners argue that the three tests of Landgraf have not been met, and that the attorney's fee provision of the PLRA should be applied to all cases pending when the Act was passed. (Petition for Certiorari; 8) In Landgraf v. USI Film Products, 511 U.S.244, 114 S.Ct.1483(1994), this Court stated that where the statute does

not contain an express effective date, courts must determine three things in evaluating the retroactive application of the statute: whether the requirements impair previously held rights; whether there is increased liability for past conduct; and whether there are any new duties imposed with respect to transactions already completed. Landgraf, 114 S. Ct. at 1505. If so, the "traditional presumption" against retroactivity precludes application "absent clear congressional intent favoring such a result." IBID. Utilizing the three tests of Landgraf, the attorney's fee provisions of the PLRA should not be applied retroactively.

(1) Whether PLRA impairs previously held rights.

Prior to enactment of the attorney's fees provision of the PLRA, the court, in its discretion, could allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. § 1988(b).

Weaver is a prevailing party as that term is defined for purposes of section 1988. The lawsuit of Weaver was a necessary and important factor in achieving the smoking ban and the implementation of the ban by the jail officials was not gratuitous or voluntary. It is clear that the jail officials implemented the smoke free policy in response to Magistrate Piester's memorandum order of January 29, 1996. (Appendix E), and that therefore, Weaver is a prevailing party. Hendrickson v. Branstad, 934 F.2d158, (8thCir.1991); Parham v. Southwestern Bell Tel. Co., 433 F.2d421(8th Cir., 1970).

Weaver and his attorney have proceeded throughout this litigation with expectation derived from judicial precedent that if

they prevailed, they would be compensated. At the time Weaver asked for a preliminary injunction on January 18-19, 1996, and on February 12, 1996 when the jail officials responded by banning tobacco smoke in the Nebraska prisons, Weaver had a right to an attorney's fee if he was determined later to be a "prevailing party". For the Petitioners to argue that the PLRA abrogates that right to an attorney's fee acknowledges that the PLRA impairs a previously held right, and therefore, the PLRA should not be applied retroactively.

(2) Whether the PLRA increases liability for past conduct.

The attorney's fee provisions of the PLRA cause no increase on the liability of the Petitioners for past conduct, only a decrease, so this is not a factor.

If the PLRA limits the award of an attorney's fee to Weaver, the law would certainly increase Weaver's financial obligation to his attorney for legal services and costs associated with the long and expensive litigation. Since the attorney is ethically prohibited from paying costs to advance a litigated action, that obligation remains with the party. If the PLRA serves to limit Weaver's opportunity to be reimbursed for legal fees and expenses, its retroactive application should not be allowed because it increases his obligation for past conduct. The past conduct is the service rendered by Weaver's lawyer prior to the passage of the PLRA. See Cooper and Davis v. Casey, 97 F.3d 914 (7th Cir., 1996).

(3) Whether the PLRA imposes new duties with respect to transactions already completed.

Petitioners have no new duties with respect to past conduct as

a result of the PLRA.

Weaver, however, has an increased obligation to his attorney if his right to receive an attorney's fee is eliminated by the PLRA. Otherwise, the PLRA imposes no new duty on Weaver with respect to past transactions.

There is no inconsistency between the Eighth Circuit's ruling in Weaver and this Court's ruling in Landgraf. The first inquiry in Landgraf is whether there is an express statement in the law concerning effective date. Section 803, the pertinent attorney's fee section, is silent on retroactive effect. Section 802, that part of the PLRA that deals with prospective relief, specifically includes language detailing retroactive effect. Congress intentionally made section 802 retroactive, but chose not to make the attorney's fee section retroactive.

Of the three tests in Landgraf, the first one ("impairment of a right possessed by a party when he acted") is answered in the affirmative. Therefore, the traditional presumption against retroactivity applies.

The Petitioners further argue that the holding of Bradley v. Richmond School Board, 416 U.S. 696 (1974) is applicable to this case in that the award (or denial) of attorney's fees is collateral to the main cause of action and separable from the cause of action to be proved at trial. The statute, they argue, does not impose an additional or unforeseeable obligation upon the Petitioners. Bradley is inapplicable to this case. As the Eighth Circuit Court in Jensen v. Clarke, 94 F.3d 1191 (8th Cir.,1996) indicated, there are two distinctions with Bradley. First, in Bradley, there was no

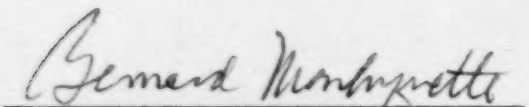
manifest injustice in allowing the school desegregation fee statute to apply because the lower courts had already awarded fees in the desegregation case on general equitable principles. Given the availability of fees under an alternative theory, the new fee statute did not impose an "unforeseeable obligation" on the school board. Bradley, 416 U.S. at 721. In Bradley, being ordered to pay attorney's fees was no great surprise, even though the legal theory under which those fees were to be imposed changed. Conversely, Weaver and his attorney have proceeded from the onset under the assumption that section 1988 would apply to his case. The PLRA did not become law until after all the activity of Weaver's case had taken place, and just before the District Court Judge ruled on the application for attorney fees. It would be "manifestly unjust" to upset those reasonable expectations and impose new guidelines at this late date in the Weaver case.

Secondly, there is evidence of congressional intent contrary to retroactive application of the attorney's fee portion of the PLRA. Congress made section 802 clearly retroactive, but did not make section 803 (attorney fee provisions) retroactive. Congress saw fit to state which section was to be retroactive, and it is not the attorney fee section. The exclusion of section 803 and its attorney's fee provisions from that clear statement is inconsistent with the Petitioners' argument for retroactivity. Bradley does not support the Petitioners' argument for retroactivity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



Bernard J. Monbouquette
Attorney for Respondent
3610 Dodge Street, Suite 220
Omaha, Nebraska 68131
(402) 346-1490

Dated: December 23, 1997